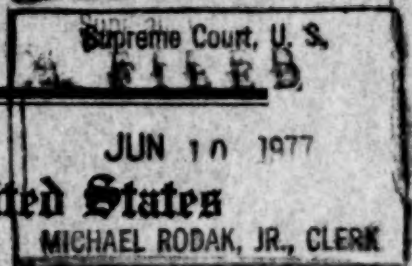


IN THE
Supreme Court of the United States

OCTOBER TERM, 1976



No. **76-1767**

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

**APPENDIX TO PETITION FOR WRIT
OF CERTIORARI**

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of Appeals for the District of Columbia Circuit

**APPENDIX TO PETITION FOR WRIT
OF CERTIORARI**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1023

UNITED STATES OF AMERICA

v.

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Appellant

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 2412-72)

Argued January 18, 1977

Decided March 14, 1977

Lee Loevinger, with whom *Martin Michaelson*, *James H. Sneed* and *Janet L. McDavid* were on the brief, for appellant.

Robert B. Nicholson, Attorney, Department of Justice, with whom *Susan J. Atkinson*, Attorney, Department of Justice was on the brief, for appellee. *Laurence K. Gustafson*, Attorney, Department of Justice also entered an appearance for appellee.

Before: WRIGHT, TAMM and LEVENTHAL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge LEVENTHAL*.

LEVENTHAL, *Circuit Judge*: The U.S. Department of Justice presses this antitrust suit against the 65,000 member National Society of Professional Engineers. It claims that the Society's efforts to enforce Section 11(c) of its

Code of Ethics, which prohibits any form of competitive bidding on engineering projects,¹ violate Section 1 of the Sherman Act.

After extensive discovery and a trial, the district court found that the Society's actions had the requisite impact on interstate commerce, that the engineering profession was not entitled to an exemption from the antitrust laws, and that the Society's prohibition of competitive bidding, as a form of price-fixing, was a *per se* violation of the Sherman Act. The District Court's extensive findings of fact and conclusions of law are set out at 389 F.Supp. 1193.

That ruling was appealed directly to the Supreme Court under the then applicable statute.² No action was

¹ Section 11(c) of the Code provides:

Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, . . .

. . . .

e. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals (F. 26, 389 F. Supp. at 1205).

² 15 U.S.C. § 29 (1970). The Statute was amended on December

taken, however, until one week after the Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), when the Court vacated and remanded the district court's ruling for reconsideration in light of *Goldfarb*. 422 U.S. 1031 (1975). After reargument, the district court issued a second opinion, reported at 404 F.Supp. 457. The district court viewed the *Goldfarb* decision, which held unlawful minimum fee schedules for legal services, as supportive of its original determination of illegality, and therefore reaffirmed its earlier findings and conclusions. The district court then entered judgment enjoining the defendant from adopting any rule or policy statement which in any way prohibits or discourages the submission of price quotations or states or implies that price competition is unethical and further ordered the defendant "to state in any publication of its Code of Ethics that the submission of price quotations for engineering services at any time and in any amount is not considered an unethical practice."

On appeal, defendant contends, *inter alia*, that the Supreme Court's opinion in *Goldfarb* leaves room for restraints on competition among professionals where those restraints serve a reasonable objective, and that the prohibition on price competition among consulting engineers is justified by the peculiar nature of the services they provide. In particular, defendant argues that the impossibility of formulating precise specifications for many engineering tasks requires that engineers engage in extensive consultation and planning with the purchaser before making a price estimate. Evils are inherent, it is said, in estimates that can only be guesses. An engineer who is forced to bid competitively on the basis of a buyer's general requirements will be under pressure that will tend to encourage optimism and mistake, and

21, 1974 to provide for initial review in the courts of appeals in most cases. 15 U.S.C. 329(a) (Supp. V 1975).

possibly cunning, all thrusting him toward an unreasonably low bid. Later, in order to avoid disastrous losses, the engineer may try to pressure the purchaser into renegotiating the contract or, failing that, may cut corners, to the disadvantage of the client and in all likelihood the public. In sum, defendant argues that a ban on competitive bidding is necessary to prevent deception and poor execution. Defendant also challenges the relief granted by the district court as overbroad and violative of defendant's First Amendment rights.

A.

We hold that the district court's findings of fact were not clearly erroneous. We affirm and approve the district court's ultimate conclusion of law. We are in agreement with most of the legal reasoning of the district court, and have identified critical passages in the margin.⁸

⁸ Section 11(c) prohibits defendant's members from engaging in any form of price competition when offering their services; selection is restricted to considerations of reputation and ability. No fee information may be given a prospective client which takes the form of cost estimates or other proposals in terms of dollars, man days of work required, or percentage of construction cost which can be compared to that of another engineer. Section 11(c), however, does permit members to disclose recommended state society fee schedules to prospective clients in the course of the selection process. Moreover, Sec. 9(b) of defendant's Code of Ethics requires its members not to accept work at a fee "below the accepted standards of the profession in the area." As a result of these sections, the only price information available for input into the client's selection equation is a uniformly regular fee schedule. (Footnotes omitted.)

J.A. 9939-40, 389 F. Supp. at 1200.

• • • •

Upon careful review of the pertinent authorities, the Court is convinced that the ethical prohibition against competitive

Price is the "central nervous system of the economy,"
United States v. Socony-Vacuum Oil Co., 310 U.S. 150,

bidding is on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act. It is not important to know what effect the Sec. 11(c) prohibition has on the price of professional engineering services. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. at 213. What is of critical significance is that the agreement among defendant's members to refrain from competitive bidding is an agreement to restrict the free play of market forces from determining price; to sacrifice freedom in pricing decisions to market stability.

J.A. 9941, 389 F. Supp. at 1200.

• • • •

By proscribing competitive bidding, Sec. 11(c) has as its purpose and effect the excision of price considerations from the competitive arena of engineering services. The ban narrows competition to factors based on reputation, ability, and a fixed range of uniform prices. The prospective client is thus forced to make his selection without all relevant market information. The Sec. 11(c) ban on competitive bidding is in every respect a classic example of price-fixing in violation of § 1 of the Sherman Act.

J.A. 9941, 389 F. Supp. at 1200.

• • • •

In determining that the fee schedule in *Goldfarb* constituted a price fixing practice, the Court emphasized the nature of the restraint, the enforcement mechanism, and the fee schedule's adverse impact upon consumers. Defendant NSPE's ban on competitive bidding, like the minimum fee schedule, is not an advisory measure. It is an absolute prohibition on price competition among defendant's members and requires immediate withdrawal should a client insist upon fee proposals or open bidding. See 389 F. Supp. at 1195 at n.1 (text of Section 11(c) of NSPE Code of Ethics). The ban clearly impedes the ordinary give and take of the market place and operates "on its face [as] a tampering with the price structure of engineering fees." *Id.* at 1200.

Enforcement of Section 11(c) of the NSPE Code is actively promoted through publications, personal letters, case opinions

226 n.59 (1940). Defendant's prohibition of competitive bidding, by blocking the free flow of price information, strikes at the functioning of the free market.

The Society may not have engaged in direct price fixing as such, but its prohibition of free price competition is not far removed, in both legal and practical consequence.

Society counsel urges that the district court erred in applying a "*per se*" rule and that the latest decisions of the Supreme Court require a more individual probing of the practice assailed, in the particular factual context. This is a false trail. To some extent, a rule that operates to prevent price competition stands at least presumptively condemned in a way that does not apply to other kinds of trade practice rules.

On its face the Society rule before us had a universal sweep, prohibiting all price competition, and on its face the rule is presumptively condemned. The district court did not take the rule solely on its face, and reach a condemnatory result merely because of an unfortunate use of language. It assessed the rule by taking into account

by defendant's Board of Ethical Review, and state society investigations into alleged misconduct. Conformity with the provision apparently has been achieved as the record reveals no significant resistance by NSPE members to the bidding ban. *Id.* at 1196; see generally *id.* at 1205-07, FFP 27-43. Since engineering services are indispensable to almost any construction project and since alternative sources (e.g., non-licensed professional engineers) are non-existent, the impact upon the public of defendant's pricing restraint is plain. Without the ability to utilize and compare prices in selecting engineering services, the consumer is prevented from making an informed, intelligent choice. See, e.g., *id.* at 1210-11, FFP 56-61; see also *Goldfarb, supra*, 421 U.S. at 785. The Court therefore finds that the combined character, enforcement, and effort of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*.

J.A. 9987-88, 404 F. Supp. at 460 (on remand).

how it had operated in fact, and with what practical anti-competitive consequences.

The Society is vexed because the district court did not make findings on its massive evidence, including its 17 expert witnesses, filling the bulk of a joint appendix of 10,000 pages. There was no need for the district court to embark on protracted findings on matters that it considered, in the last analysis, to be unavailing as a defense. Sound antitrust doctrine did not require a simulation of "cost-benefit ratio" analysis, or a "balancing" of the benefits accruing from competitive restraints of this nature.

B.

We interject here to respond to the contention of counsel for the Society this is not a matter for independent analysis of sound antitrust doctrine, and that the case is controlled by the Supreme Court's action on this very case in the wake of its *Goldfarb* ruling. The contention is that because this case was not affirmed by the Supreme Court on its prior visit, but was remanded for further consideration in the light of *Goldfarb*, the total implication was that the decree should be reversed. We see no warrant for this speculative reconstruction. The Supreme Court had just decided *Goldfarb*; instead of taking the time to engage in a detailed study of cases involving closely related issues, it requested the district court to do so. The district court did so, and it concluded that although *Goldfarb* was not a square holding absolutely in point of its major thrust was in accord with the district court's decree. We think this was a sound discernment of *Goldfarb* and its radiations.

C.

We do not say or imply that there is no room in antitrust law for ethical rules of practice for the learned pro-

fessions, to prevent harm to the lay consumer and general public. What we do say is that the rationalization offered by the Society does not justify the broad ban on all competitive bidding which the Society has attempted to enforce.⁴ Section 11(c) has been stolidly applied as a block governing any and all engineering services associated with the study, design, and construction of real property improvements. It does not take into account the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information. It forbids the premature disclosure of all types of fee information—including cost estimates based on man-days of work and percentage of construction cost. The only exception to its broad prohibition concerns fee schedules recommended by the state society.

The full thrust of the defendant's prohibition is sharply etched in the findings of the district court. The district court found that in 1970, the Department of Defense attempted to test a new procedure for the selection of architectural-engineering firms which would include an element of price competition. Under this procedure, prequalified

⁴ We find largely irrelevant, in deciding the issue before us, opinions dealing with the legality of prohibitions on the advertising of professional fees. *Consumers Union v. American Bar Association*, No. 75-1015-R (E.D. Va. Dec. 15, 1976) (three judge court); *Bates v. Arizona State Bar*, (Ariz. Sup. Ct. July 26, 1976), *prob. juris. noted*, 97 S.Ct. 53 (1976). Apart from potential distinctions between professions, there is an enormous difference between advertising fee information to the general public and responding to a request for an estimate or bid on a particular job. Fee information thrust at the public is more likely to reach individuals unable to evaluate its significance. In addition, the professional who advertises his fee is generally publicizing a price for a project whose nature is not yet known to him. In contrast, the professional who responds to a request for a bid has a better grasp of the specific task before him and a better opportunity to take into account the sophistication of the potential purchaser. Thus we see no correlation between these two issues.

engineering firms were invited to submit two sealed envelopes separately containing a technical proposal and a non-binding price estimate. The technical proposals were to be opened and evaluated by a selection board on the basis of their technical competence. Then the envelopes containing the price estimates were to be opened and a determination made as to whether price considerations warranted a change in the ratings of the proposals. The test procedure was to be conducted for a period of only one year, and in only two military construction districts. Despite the relative sophistication of the purchaser, the extensive provision for consideration of factors other than price, and the limited nature of this experiment, the Society advised its members that the DOD test procedure was unethical and urged them not to submit price information. As a result, the Department of Defense was unable to obtain price proposals under the test procedure.

The Society's opposition to the Defense Department's cautious and well conceived experiment is symbolic of the implacability of the Society's campaign to prohibit competitive bidding. Because of the breadth of 11(c) on its face and as enforced, the district court was fully justified in granting the broad injunctive relief. Counsel for the Society puts it that the Society is willing to work out a more refined decree, one more limited in its objectives and restraints. The situation might be different if the Society had taken the initiative along these lines, rather than a kind of all-out resistance to the lawsuit on the ground that its rules were necessary at the very core for sound regulation. The case as it stands presents a Society whose program has been one of all-out interdiction of price information for the client who has not selected its engineer, and this warrants a firm remedial decree. If the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree.

D.

It is in light of the foregoing analysis that we approve the approach taken by the district court, its comment that the Rule is classic price-fixing, and hence illegal "per se," while adding a word of refinement of analysis. A combination "formed for the purpose and with the effect" of fixing or stabilizing prices is illegal *per se*. *United States v. Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 223; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). This formulation of doctrine began in *United States v. Trenton Potteries*, 273 U.S. 392, 397-98 (1927), and reached full expression in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), in which the Court explained that price fixing is one of a group of restraints conclusively deemed unreasonable, devoid of any "redeeming virtue" that the law need take into account and measure in the scales. *Id.* at 5. There is a co-existing doctrine that, in limited contexts, permits a business group to adopt a rule or practice that is narrowly defined in terms of intended social benefits notwithstanding potential effect on price, but these limited contexts are inapplicable here.⁵ That co-existing doctrine may come to have application to ethical rules of professional

⁵ For example, in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), the effect on price was only a temporary hold, governing only a small part of total transactions, put into effect by a board of trade representing and regulating both buyers and sellers.

The doctrine permitting some trade association reporting, which originated in *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563 (1925), increased the amount of economic information available and thereby facilitated the rational decision-making necessary for effective competition. Further, the nature of the information exchanged, and the absence of any agreement to compel adherence to particular prices, made it highly unlikely that any anti-competitive abuse could occur.

associations narrowly confined to interdiction of abuses,⁶ a problem we need not explore in view of the quite different context of this case.

In this case what is presented is a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers. In that context, the absolute rule is fairly identified as a price-sustaining mechanism. The issue is not one of mere semantics, it is one of accurate identification or classification of a rule having regard to its language, purpose and effect. The district court correctly appraised the rule before it as one that at its core "tampers with the price structure,"⁷ and as therefore illegal without regard to claimed or possible benefits.

E.

In view of the foregoing, we affirm the district court's decree, except in one respect in which we think the decree is overbroad: It not only enjoins the Society from adopting any policy statement which describes price competition as "unethical," but also orders the Society to state affirmatively that it does not consider competitive bidding to be unethical. To force an association of individuals to express as its own opinion judicially dictated ideas is to encroach on that sphere of free thought and expression protected by the First Amendment. Any such regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest. The decree provision commanding the Society to state that in

⁶ See generally *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 n.17 (1975).

⁷ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

its view certain practices were not unethical goes beyond this. Cf. *National Labor Relations Board v. Teamsters and Chauffeurs Union*, 241 F.2d 428 (7th Cir. 1957); *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*, 142 F.2d 922, 926 (3d Cir. 1944) (company could be required to post notices, but not to forgo expressing its opinions on labor matters). Compare *International Union of Elect'l, Radio and Machine Workers v. NLRB*, 127 U.S.App.D.C. 303, 383 F.2d 230 (D.C. Cir. 1967), cert. denied, 390 U.S. 904 (1968). Certainly the harm wrought by the prior statements that the practices were unethical requires corrective action, but we are inclined to the view that the purposes of the Sherman Act would be fully served by a decree forbidding the Society from future expression that the price practice is unethical, and requiring it to publish an advice that its prior ruling has been rescinded in light of the court's decree that it was an unlawful interference with a legal right of the engineer, protected under the antitrust laws, to provide price information to a prospective client in advance of retainer.

The case is remanded with instructions to modify the decree in part; otherwise, the judgment is affirmed.

So ordered.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil No. 2412-72

UNITED STATES OF AMERICA, *Plaintiff*

v.

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, *Defendant.*

(FILED DECEMBER 4, 1975)

Order

This matter having come before the Court upon the application of the defendant pursuant to 15 U.S.C. § 29(b) for an order permitting direct appeal from the Judgment entered herein on November 26, 1975 to the United States Supreme Court, and the Court having fully considered the arguments of the defendant in support of its application and the opposition of the plaintiff to the entry of such an order as well as the record and proceedings herein, it is this 4th day of December, 1975 hereby

ORDERED that the application of the defendant pursuant to 15 U.S.C. § 29(b) for an order permitting direct appeal in this case to the United States Supreme Court is denied.

/s/ JOHN LEWIS SMITH, JR.
United States District Judge

CAPTION OMITTED IN PRINTING

(FILED NOVEMBER 26, 1975)

Judgment

Upon consideration of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court's previous decision in United States v. National Society of Professional Engineers, 389 F.Supp. 1193 (1974), the memoranda of points and authorities submitted by the parties upon remand, and the entire record herein; oral argument of counsel having been heard; and for the reasons set forth in the accompanying Memorandum Opinion, it is by the Court this 26th day of November, 1975

ORDERED, ADJUDGED, and DECREED that this Court's previous Opinion, Findings of Fact and Conclusions of Law are reaffirmed; and it is further

ORDERED, ADJUDGED, and DECREED that:

I

This Court has jurisdiction over the subject matter of this action and the parties hereto.

II

The defendant is found to have violated Section 1 of the Sherman Act (15 U.S.C. § 1) by combining and conspiring with its members and state societies to unreasonably restrain interstate trade and commerce in the sale of engineering services.

III

The provisions of this Final Judgment which apply to the defendant shall also apply to the defendant's officers, directors, agents, employees, successors and assigns, and to all other persons in active concert or participation

with the defendant who receive notice of this Final Judgment by personal service or otherwise.

IV

The defendant is enjoined and restrained from participating in or adopting any plan, program or course of action which in any manner prohibits, discourages or limits members of the defendant from submitting price quotations for engineering services at such times and in such amounts as they may choose or which otherwise has the purpose or effect of suppressing or eliminating competition based upon engineering fees among members of the defendant.

V

The defendant is ordered and directed, within 60 days of the effective date of this Final Judgment, to amend its Code of Ethics, policy statements, opinions of its Board of Ethical Review, manuals, handbooks, rules, constitution, by-laws, resolutions and any other of its statements, guidelines or publications to eliminate therefrom any provisions, including Sections 9(b) and 11(c) of its Code of Ethics and any references thereto, which in any manner prohibit, discourage or limit the submission of price quotations for engineering services by members of the defendant or which state or imply that the submission of price quotations for engineering services or that competition by members of the defendant based upon engineering fees is unethical, unprofessional, contrary to the public interest or contrary to any policy of the defendant.

VI

The defendant is ordered and directed, within 60 days of the effective date of this Final Judgment, to amend its Code of Ethics, policy statements, opinions of its Board of Ethical Review, manuals, handbooks, rules, by-laws,

resolutions and any other of its statements, guidelines or publications to eliminate therefrom all references to engineering fee schedules or guides published by any engineering society. The defendant is further enjoined and restrained from adopting, endorsing or promoting any engineering fee schedule or guide.

VII

The defendant is enjoined and restrained from adopting or disseminating in any of its publications or otherwise, any Code of Ethics, opinion of its Board of Ethical Review, policy statement, rule, by-law, resolution or guideline which in any manner prohibits, discourages or limits the submission of price quotations for engineering services by members of the defendant or which states or implies that the submission of price quotations for engineering services or that competition by members of the defendant based upon engineering fees is unethical, unprofessional, contrary to the public interest or contrary to any policy of the defendant.

VIII

The defendant is ordered and directed, within 60 days of the effective date of this Final Judgment, to send a copy of this Final Judgment to each of its affiliated state engineering societies and local chapters and to each State Board of Engineering Registration in the United States and territories thereof, and to cause the publication of this Final Judgment in the magazine *Professional Engineer* and the newsletter *Private Practice News*, in such a fashion and as prominently as feature articles are regularly published in said magazine and newsletter, and to send a copy of such magazine and newsletter to each member of NSPE and the Professional Engineers in Private Practice section of NSPE. The defendant is further ordered and directed to send a copy of this Final Judgment to each new member of NSPE and to state in any

publication of its Code of Ethics that the submission of price quotations for engineering services at any time and in any amount is not considered an unethical practice. The text of such statement shall first be approved by the plaintiff.

IX

The defendant is ordered and directed to revoke the NSPE charter of and to refuse NSPE affiliation to:

- (A) any state engineering society which in any manner prohibits, discourages or limits its members from submitting price quotations for engineering services at such times and in such amounts as they may choose or which otherwise participates in or adopts any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among its members based upon engineering fees; and,
- (B) any state engineering society which has within its organization any local chapter which in any manner prohibits, discourages or limits its members from submitting price quotations for engineering services at such times and in such amounts as they may choose or which otherwise participates in or adopts any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among its members based upon engineering fees.

For the purpose of carrying out the provisions of this section the defendant is ordered and directed to require, as a prerequisite for an NSPE charter or continued NSPE affiliation of any state engineering society, that such state engineering society submit to the defendant within 60 days of the effective date of this Final Judgment a written certification by an official of such state engineering society that neither it nor any of its local chapters in any manner prohibit, discourage or limit their members from submitting price quotations for engineer-

ing services at such times and in such amounts as they may choose and neither it nor any of its local chapters participate in or have any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among their members based upon engineering fees. The defendant is further enjoined and restrained from granting or continuing an NSPE charter or NSPE affiliation to any state engineering society which does not comply with the defendant's request for the certification required herein. The defendant shall retain each such certification during the period of the NSPE charter or NSPE affiliation of the state engineering societies submitting it.

X

The defendant is ordered and directed to file with the plaintiff 90 days from the effective date of this Final Judgment and on each anniversary date of the effective date of this Final Judgment for a period of five years, a report setting forth the steps it has taken to comply with the provisions of this Final Judgment.

XI

For the purpose of securing compliance with this Final Judgment, any duly authorized representative of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to its principal office, be permitted:

- (A) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant relating to any of the matters contained in this Final Judgment; and,
- (B) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview the officers and employees of

said defendant, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, the defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports relating to any of the matters contained in this Final Judgment as may from time to time be requested. No information obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XII

The plaintiff shall recover the costs of this action from the defendant.

XIII

Jurisdiction is retained for the purpose of ordering other specific and further relief herein as the Court upon application of the plaintiff may determine to be necessary or appropriate and consistent with the Opinion of the Court and its Findings of Fact and Conclusions of Law. Jurisdiction is also retained for the purpose of enabling either of the parties to this Final Judgment to apply to the Court at any time for any further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of the violation of any of the provisions contained therein or subsequently ordered upon the application of the plaintiff.

/s/ JOHN LEWIS SMITH, JR.
United States District Judge

STATUTES AND REGULATIONS INVOLVED *

15 U.S.C. § 1 Sherman Act, Section 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with Foreign nations, is declared to be illegal

Representative United States Statutes, Regulations and Legislative History Regarding Solicitation of Professional Engineering Work by Fee Bidding

Pub. L. No. 68-463 (February 24, 1925).

Pub. L. No. 69-141 (April 22, 1926).

10 U.S.C. § 4540, *see* H.R. Rep. No. 1312, 76th Cong. 1st Sess. 2-3 (1939) and Sen. Rep. No. 667, 76th Cong. 1st Sess. 2-3 (1939).

10 U.S.C. § 7212, *see* H.R. Rep. No. 76, 76th Cong., 1st Sess. 8-9, 10-11 (1939), and Sen. Rep. No. 263, 76th Cong., 1st Sess. 22-23 (1939).

Military Construction and Reserve Forces Facilities Authorization Act, 1971, Pub. L. No. 91-511 (October 26, 1970), 84 Stat. 1204, 1222.

Military Construction and Reserve Forces Facilities Authorization Act, 1972, Pub. L. No. 92-145 (October 27, 1971), 85 Stat. 394, 410.

Military Construction and Reserve Forces Facilities Authorization Act, 1973, Pub. L. No. 92-545 (October 25, 1972), 86 Stat. 1135, 1152.

Reserve Force Facilities Authorization Act, 1974, Pub. L. No. 93-166 (November 29, 1973), 87 Stat. 661.

* The material contained herein is extracted from the record before the District Court.

10 U.S.C. § 2304(a)(4) (1970), pursuant to which Armed Forces Procurement Regulations were issued, 32 C.R.F. §§ 18.402-1 through 18.405 (1973).

41 U.S.C. § 252(c)(4) (1970).

The Brooks Act, 40 U.S.C. §§ 541-44 (Supp. II, 1972), which provides:

§ 541. *Definitions.*

As used in this subchapter—

(1) The term “firm” means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

(2) The term “agency head” means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

(3) The term “architectural and engineering services” includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. (June 30, 1949, ch. 288, title IX, § 901, as added Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1278.)

§ 542. *Congressional declaration of policy.*

The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices. (June 30, 1949, ch. 288, title IX, § 902, as added Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1279).

§ 543. *Requests for data on architectural and engineering services.*

In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms, deemed to be the most highly qualified to provide the services required. (June 30, 1949, ch. 288, title IX, § 903, as added Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1279.)

§ 544. *Negotiation of contracts for architectural and engineering services.*

(a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services rendered, the scope, complexity, and professional nature thereof.

(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency

head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached. (June 30, 1949, ch. 288, title IX, § 904, as added Oct. 21, 1972, Pub. L. 92-582, 86 Stat. 1279.)

See H.R. Rep. No. 92-1188, 92d Cong., Sess. (1972) and Sen. Rep. No. 92-1219, 92d Cong., 2d Sess. (1972).

38 Fed. Reg. 33594 (December 6, 1973).

39 Fed. Reg. 8160-61 (March 4, 1974) (Agency for International Development, Department of State).

41 C.R.F. §§ 5B-3.804 through 5B-3.805-2 (1973) (General Service Administration).

41 C.F.R. §§ 18-4.200 through 18-4.205-3 (1973) (National Aeronautics and Space Administration).

39 Fed. Reg. 10135-38 (March 18, 1974) (Atomic Energy Commission).

41 C.R.F. §§ 8-4.5001 through 8-4.5003-4 (1973) (Veterans Administration).

41 C.R.F. §§ 12-50.200 through 12-50.206 (1973) (Department of Transportation).

41 C.F.R. § 14-3.802 (1973) (Department of the Interior).

State Statutes and Regulations Regarding Solicitation of Professional Engineering Work By Fee Bidding

Alabama

Ala. Code tit. 46, § 128(20) (Cum. Supp. 1971) provides that the state Board of Registration for Professional Engineers and Land Surveyors may censure or revoke the certificate of any licensed engineer for: "... (2) Any gross negligence, incompetency, violation of the code of ethics prescribed by the Board or any amendment thereof, or misconduct in the practice of engineering . . ."

The Code of Ethics prescribed by the state Board provides: "It shall be considered unprofessional and inconsistent with Honorable and Dignified practice for any Professional Engineer . . . (4) to compete with another Engineer . . . for employment, by reducing his usual charges or the use of unethical practices."

Ala. Code tit. 55, § 507 (Cum. Supp. 1971) provides: "Competitive bids shall not be required for . . . contracts for securing of services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accounts, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part . . ."

The foregoing statute comprises an exemption from Ala. Code tit. 55, § 506 requiring competitive bidding for expenditures of state funds.

Alaska

Alaska Stat. § 08-48-111 (1972) authorizes revocation of an engineer's certificate of registration by the State Board of Registration for Architects, Engineers and Land Surveyors for: "... (2) gross negligence, incompetence, or misconduct in the practice of architecture, engineering or land surveying; (3) violation

of this chapter, a regulation adopted under it, or the code of ethics of professional conduct as promulgated by the Board; . . ."

Regulations issued by the Board provide: "The engineer, architect or land surveyor shall seek professional employment on the basis of qualifications and competence for proper accomplishment of the work. He shall not knowingly solicit or submit proposals for professional services on the basis of competitive bidding."

Alaska Stat. § 37.05-230 (1970) provides that: "(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; . . . except that . . . (c) competitive bids need not be required . . . (vi) for professional services; . . ."

Alaska Stat. § 44.43-030 (1967) provides: "If it is not feasible for the staff of the Department of Public Works to perform design and engineering services or surveys, the commissioner may contract with a private engineering firm for design and engineering services or surveys on a negotiated basis after reasonable public notice is given. The prices submitted or negotiated shall be available for public inspection upon request."

Alaska Stat. § 44.44.030 (1967) similarly provides: "If it is not feasible for the staff of the Department of Highways to perform design and engineering services or surveys, the commissioner may contract with a private engineering firm for design and engineering services or surveys on a negotiated basis after reasonable public notice is given. The prices submitted or negotiated shall be available for public inspection upon request."

Arizona

Ariz. Rev. Stat. Ann. § 41-1052 (Supp. 1973) relating to contracts for professional services, provides: "The selection of such persons shall be determined on the basis of demonstrated competence and qualifications to perform the required type of outside professional services at fair and reasonable compensation." § 41-1055 provides: "No contracts may be awarded pursuant to the provisions of this article solely on the basis of price. The budget unit shall contract with the qualified firm at compensation which the budget unit determines is fair and reasonable, taking into account budgetary limitations, the scope, complexity and professional nature of the services."

Arkansas

Ark. Stat. Ann. § 5-1012 (Supp. 1973) provides: "The Authority is hereby authorized to employ architects to prepare plans, specifications and estimates of cost for the construction of public buildings hereunder and to supervise and inspect such construction. After the Authority shall have approved the plans and specifications prepared by the architect, it shall proceed to advertise for bids and contract for the construction of the public buildings in accordance with applicable laws governing the construction of public buildings. In addition, the Authority is hereby authorized to engage and pay such professional, technical and other help as it shall determine to be necessary or desirable in assisting it to carry out effectively the authorities, functions, powers, and duties conferred and imposed upon it by this Act."

California

Cal. Gov't. Code § 53060 (West Supp. 1974) relates to procurement of engineering services and advice and

exempts from competitive bidding requirements the procurement of professional services. *See Cobb v. Pasadena City Board of Education*, 134 Cal. App. 2d 93, 285 P.2d 41 (1955).

Connecticut

Conn. Gen. Stat. Rev. § 20-307 (1972) authorizes suspension or revocation of an engineer's certificate if he: "has been found guilty by the Board [of Registration for Professional Engineers and Land Surveyors] or by a court of competent jurisdiction, of any fraud, deceit, gross negligence, incompetency or misconduct in his professional practice, or if it is shown to the satisfaction of the board that the holder of the certificate has violated any provision of this chapter or any regulation adopted by the board."

The Code of Ethics adopted by the State Board provides: "... 3-7 He will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone." Section 20-300-13 of the Board rules provide: "The Board, in enforcement of the Canon of Ethics, will be guided by the interpretation of the Canons published by the National Society for Professional Engineers as rules of professional conduct."

Delaware

Del. Code Ann. tit. 24, § 2823 (Supp. 1972) provides for revocation or suspension of an engineer's authorization to practice if he has committed "... B. Any gross negligence, incompetence, or misconduct in the practice of engineering."

Del. Code Ann. tit. 24, § 2816 (Supp. 1972) provides: "The Council shall prepare and publish a Code of Ethics designed for the protection of the public. All

Members, Associate Members, Affiliated Members, holders of Certificates of Authorization, and permittees must subscribe to and follow this Code of Ethics in the practice of Professional Engineering."

The Code of Ethics prepared and published by the Council provides: "5. The Engineer shall solicit or accept work only on the basis of his qualifications . . . B. The engineer shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit or submit proposals for professional services based solely on competitive bidding. Competitive bidding is defined as the submission, or receipt, of verbal or written estimates of costs in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on solely a price bid, prior to the time one engineer or one engineering organization has been selected for negotiations. The submission and discussion of data published by professional engineering societies is not considered to constitute competitive bidding."

District of Columbia

D. C. Code Ann. § 1-808 (1973) provides: "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except . . . (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature. . . ."

Florida

The Consultants' Competitive Negotiations Act, Chap. 73-19 (West's 1973 Fla. Sess. Law Service) pro-

vides for a competitive negotiation procedure to be used for the obtaining of professional engineering services by the state or its agencies, municipalities or political subdivisions, school districts and school boards. The negotiation procedure provides for awarding contracts on the basis of qualifications, with fees negotiated only after selection of the most qualified firm.

Georgia

Ga. Code Ann. § 44-2140 (Supp. 1973) provides for revocation or suspension of an engineer's certificate if he is found guilty of "... (b) Any gross negligence, incompetence, or unprofessional conduct in the practice of professional engineering ... (e) Any violation of the provisions of this Chapter or any rule or regulation promulgated by the Board [of Registration for Professional Engineers and Land Surveyors] pursuant to the power conferred on it by this Chapter.

'Unprofessional conduct,' as referred to in subsection (b) herein for the purposes of the section, shall be defined as a violation of those standards of ethics and professional conduct for professional engineers and land surveyors which have been adopted and promulgated hitherto by the board pursuant to the power conferred upon it to promulgate rules and regulations to effectuate the duties and powers conferred on it by this Chapter."

Rule 180-10-.01 of the Board provides: "In defining misconduct in the practice of professional engineering by a registered professional engineer, the Board will consider among other things, the Code of Ethics adopted by the Board." The Code of Ethics adopted by the Board provides:

"Section 11. The Engineer will not compete unfairly with another engineer by attempting to obtain employ-

ment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods.

* * *

c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. The principles shall be applied by the Engineer in obtaining the services of other professions."

Hawaii

Hawaii Rev. Stat. § 464-10 (1968) provides for revocation or suspension of an engineer's certificate for "gross negligence, incompetency, or misconduct in the practice of his profession or: ... [for] violating this chapter or the rules or regulations of the Board [of Registration of Professional Engineers, Architects and Surveyors]." Rules and regulations of the Board provide: "1.2.(j) *Misconduct in the Practice*. Miscon-

duct in the practice of the profession of engineering architecture, land surveying or landscape architecture constitutes any or all of the following: . . . (4) To enter into competitive bidding against another on the basis of compensation or to use donation or misleading information on cost as a device for obtaining competitive advantage."

Illinois

Ill. Rev. Stat. ch. 48½, § 49 (Supp. 1974) provides for revocation or suspension of an engineer's certificate for: "... 2. Any gross negligence, incompetency or misconduct in the practice of professional engineering ..."

Rules of Professional Conduct promulgated by the Illinois Department of Registration and Education provide: "5. Solicitation of Work . . . B. The Engineer shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit nor submit proposals for professional services on the basis of competitive bidding. Competitive bidding is defined as the formal or informal submission or receipt of verbal or written estimates of cost or proposals in terms of dollars or percentage of construction cost, or any other measure of compensation whereby the prospective client may compare, on the same defined project, engineering services on a price basis only, prior to the time that one engineer or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding."

Ill. Rev. Stat. An. ch. 24, § 8-10-4 (Supp. 1974), relating to purchasing and public works contracts in cities of more than 500,000 population, provides:

"Contracts which by their nature are not adapted to award by competitive bidding, such as but not limited to contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part . . . shall not be subject to the competitive bidding requirements of this Article."

Indiana

Ind. Ann. Stat. § 63-1517 (Burns Supp. 1973) establishes a State Board of Registration for Professional Engineers and Land Surveyors. Rule No. 14 promulgated by the Board requires adherence to the Canons of Ethics of Engineers as approved by the Engineer's Council for Professional Development, dated September 30, 1963. That Code of Ethics provides: "He (the engineer) will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone."

Kentucky

Ky. Rev. Stat. § 45.360 (1971) provides: "The director of purchases, under the direction of the commissioner of finance, shall purchase . . . the combined requirements of all spending agencies of the state . . . except that competitive bids may not be required: . . . (f) For professional, technical, or artistic services (contracts exempted by this provision shall be referred to the Department of Personnel for review and approval.)"

Massachusetts

Mass. Gen. Laws Ann. ch. 13, § 45 (1973) establishes a Board of Registration of Professional Engineers and of Land Surveyors. Canons of Ethics adopted by

the Board provide: "He (the engineer) will not invite or submit price proposals for professional services which require creative intellectual effort, on a basis that constitutes competition on price alone. Due regard should be given to all professional aspects of the engagement."

Mass. Gen. Laws Ann. ch. 7, § 30B (Supp. 1973) provides: "Designer selection board. There shall be in the executive office for administration and finance a designer selection board, consisting of the director of building construction *ex officio*, and five members to be appointed by the governor, of whom two shall be registered architects and two shall be registered professional engineers. In making the original appointments to said board, two members shall be appointed for terms of one year and three members shall be appointed for terms of two years. Upon the expiration of the term of any appointive member his successor shall be appointed for a term of two years. The board shall encourage architects and engineers to apply for appointment as project designers, shall assemble and maintain current information concerning the organization, experience and qualifications of architects and engineers interested in acting as project designers, and shall, from time to time, solicit information from or interview such interested architects and engineers. Any project subject to the control and supervision of the director of building construction which is not being undertaken by the operating agency, as provided in section thirty of chapter six A, shall be referred by the commissioner to the board, which shall promptly provide suitable public notice of the proposed project. The operating agency shall delegate a representative to deliberate and vote with the board on its recommendations to the commissioner concerning the selection of a designer for the project. The board shall, on the basis of such criteria as it deems appropriate, and

after a review of information submitted by all persons applying for appointment and interviews, where appropriate, recommend to the commissioner at least three designers for each project. The board's recommendation shall be in writing and shall constitute a public record. The recommendation of designers by the board shall be advisory to the commissioner. The commissioner shall, after receiving the board's recommendation, appoint the project designer. In the case of clearly separable work on one project, the board may recommend and the commissioner may appoint more than one designer, if in his opinion such action would benefit the commonwealth. If the board deems it appropriate it may recommend that the commissioner hold a design competition to select a project designer. The board shall establish the scope and rules for such competition. If the commissioner decides to hold such competition he shall hold the competition in accordance with the scope and rules established by the board and shall appoint as such project designer the winner in such competition. No person shall be appointed a designer unless he is a registered architect or a registered professional engineer, nor shall any partnership or corporation be so appointed unless at the time thereof a majority of the partners or the directors of the corporation shall be so registered. When the commissioner appoints a designer, he shall forthwith notify in writing the secretary of transportation and construction of the appointment, and said secretary shall instruct the director of building construction forthwith to enter into a contract with the designer, subject to such conditions as the commissioner may set forth in said notice."

Minnesota

Min. Stat. Ann. § 326.04 (Supp. 1974) establishes a State Board of Registration for Architects, Engineers,

and Land Surveyors. Rules of Professional Conduct adopted by the Board provide that each applicant shall agree "... (8) To uphold the principles of appropriate and adequate compensation for professional services and to refrain from improper or questionable methods of soliciting work."

Mississippi

An opinion of the Attorney General of Mississippi, dated January 11, 1958, states: "I am of the opinion that a contract for professional engineering services is just like that for any other professional services, such as an Attorney and that a public agency is not required by law to advertise for bids for such professional engineering services."

Montana

Mont. Rev. Codes Ann. § 66-2327 (1970) establishes a State Board of Registration for Professional Engineers and Land Surveyors. [Renamed Board of Professional Engineers and Land Surveyors, Mont. Rev. Codes Ann. § 82A-1602(11) (Supp. 1973).] Section 40-3.86(6)-58690 of the Rules promulgated by the Board provides: "The Board will expect all engineers and land surveyors to uphold and advance the honor and dignity of the Engineering and Surveying Profession and Registration law within the ethical standards set forth in both the Code of Ethics included in the application form and as published by the National Society of Professional Engineers."

Nevada

Nev. Rev. Stat. § 625.410 (1967) provides for revocation or suspension of an engineer's certificate if he is found guilty of "... 2. Any gross negligence, incompetency or misconduct in the practice of professional engineering ..."

Nev. Rev. Stat. § 625.140 (1971) provides: "The Board [of Registered Professional Engineers] shall have the power to make all bylaws and rules, including the adoption and promulgation of a code of conduct which shall be binding upon persons registered under this chapter, not inconsistent with the constitution and laws of this state, which may be reasonably necessary for the proper performance of the duties of the board, the regulation of the proceedings before it and the maintenance of a high standard of integrity and dignity in the profession. The initial code of conduct shall be submitted for ratification to all persons registered under this chapter, and ratification shall be accomplished by the approving vote of a minority of such registered persons who are residing in the State of Nevada on the date such code is submitted for ratification."

The Code of Conduct adopted by the Board provides: "They (registered engineers) will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone."

New Hampshire

N.H. Rev. Stat. Ann. § 8:32-a (Supp. 1973) provides:

"I. The general court of New Hampshire hereby declares that it shall be the policy of the state and its agencies to negotiate contracts for engineering and architectural services on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices and to encourage members of these professions engaged in the lawful practice of their profession to submit to agency heads, annually, a statement of qualifications and performance data."

II. Each agency shall prepare a description of its procedures for procurement of architectural and engineering services. The agency head, for each proposed project, shall review and consider the current statements of qualifications and performance data and availability of not less than three firms. He shall for purposes of negotiation, arrange the firms deemed to be best qualified in order of preference as determined in accordance with the prescribed procedures of the agency.

III. The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the state. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

IV. Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the state, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

V. Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

New Jersey

N. J. Stat. Ann. § 40A:11-1 *et seq.* (Special Pamphlet 1973), the New Jersey Local Public Contracts Law, requires competitive bidding for contracts let by municipalities, counties and political subdivisions of municipalities and counties involving expenditures over \$2,500.

N.J. Stat. Ann. § 40A:11-5 (Special Pamphlet 1973) provides: "Any purchase, contract or agreement of the character described in section 4 of this act may be made, negotiated or awarded without public advertising for bids and bidding therefor if (1) The subject matter thereof consists of (a) Professional services ..."

N. J. Stat. Ann. § 27:12B-5.2 (Supp. 1974) requires advertising and selection by competitive bidding for contracts entered into by the New Jersey Highway Authority involving expenditures over \$2,500 "... provided, however, that such advertising shall not be required where the contract to be entered into is one for the furnishing or performing services of a professional nature ..."

North Carolina

N. C. Gen. Stat. § 289-4 (Cum. Supp. 1973) establishes a State Board of Registration for Professional Engineers and Land Surveyors. The Code of Ethics adopted by the Board provides: "Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods . . . c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional en-

gineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals."

North Dakota

N.D. Cent. Code § 43-19.1-03 (Supp. 1973) establishes a State Board of Registration for Professional Engineers and Land Surveyors. N.D. Cent. Code § 4-19.1-24 (Supp. 1973) provides: "The board shall cause to have prepared and shall adopt a code of ethics, a copy of which shall be delivered to every registrant and applicant for registration under this chapter, and which shall be published in the roster provided for herein. The board may revise and amend this code of ethics from time to time, and shall forthwith notify each registrant in writing of such revisions or amendments. Such code of ethics when adopted shall apply to all certificate holders, including specialists in a particular branch of the engineering or surveying profession.

The Code of Ethics adopted by the Board provides: "Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods . . . (c). He shall not solicit or submit engineering proposals on the basis of competitive bidding. [Competitive bidding] [f]or professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. An engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he may withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals."

Ohio

Ohio Rev. Code Ann. § 4733.20 (Page Supp. 1972) provides for revocation or suspension of an engineer's certificate if he is found guilty of "... (5) Violation of the code of ethics promulgated and adopted by the state board of registration for professional engineers and surveyors."

The Code of Ethics promulgated and adopted by the Board provides in ES-27-06(B): "The Engineer or Surveyor shall seek professional employment on

the basis of qualification and competence for proper accomplishment of the work. He shall not knowingly solicit or submit proposals for Professional Services on the basis of competitive bidding."

Ohio Rev. Code Ann. § 307.86 (Page Supp. 1972) provides: "Anything to be purchased, leased, leased with an option or agreement to purchase, or constructed, including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service except the services of an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser by or on behalf of the county or contracting authority, . . . at a cost in excess of two thousand dollars, . . . shall be obtained through competitive bidding."

Oklahoma

Okla. Stat. Ann. tit. 59, § 475.18 (1971) provides for revocation or suspension of an engineer's certificate if he is found guilty of ". . . (d) violation of the Code of Ethics adopted and promulgated by the Board [of Registration for Professional Engineers and Land Surveyors]. The Code of Ethics adopted and promulgated by the Board provides: "Each registrant of the Oklahoma State Board of Registration for Professional Engineers and Land Surveyors will uphold and advance the honor and dignity of the engineering and surveying profession and in particular will comply with following canons: . . . 3—Refrain from submitting competitive bids for professional services or using other improper or questionable methods of soliciting professional work."

Okla. Stat. Ann. tit. 74, § 85.7 (Supp. 1974) provides: "No acquisition or contract shall be made in excess of Five Hundred Dollars (\$500.00) without the submis-

sion of competitive bids by the State Purchasing Director, and such acquisition or contract shall be awarded to the lowest and best bidder therefor at a specified time and place, which shall be open to the public, with such preference between bidders offering substantially the same products or services at substantially the same prices, as may be set under the authority of Section 5(7) (74 O.S. 1961, § 85.5(7)). Provided, that such competitive bid requirement shall not apply to contracts for architectural, engineering, legal, and other professional services; . . ."

Oregon

Ore. Rev. Stat. § 672.240 (1971) establishes a State Board of Engineering Examiners. Rules of Professional Conduct prescribed by the Board provides: "... (b) The Engineer or Land Surveyor shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit or submit proposals for professional services solely on the basis of competitive bidding. The disclosure of recommended fee schedules prepared by various engineering or land surveying societies is not considered to constitute competitive bidding."

Ore. Rev. Stat. § 672.200 (1971) provides for revocation or suspension of an engineer's certificate "... (4) For any violation of the rules of professional conduct prescribed by the Board."

Pennsylvania

Pa. Stat. Ann. tit. 53, § 46402 (Supp. 1974) governs purchasing by the various boroughs in the state and requires competitive bidding on contracts over \$1,000 except as provides in § 46402(d). § 46402(d)(5) provides: "The contracts or purchases made by council,

involving an expenditure of over one thousand dollars (\$1,000), which shall not require advertising or bidding as hereinbefore provided, are as follows: . . . (5) Those involving personal or professional services."

South Carolina

S.C. Code Ann. § 56-704 (1962) establishes a State Board of Engineering Examiners. Rules of Professional Conduct adopted by the Board provide: "The Engineer or Land Surveyor shall solicit or accept work only on the basis of his qualification."

South Dakota

S. D. Compiled Laws Ann. § 36-18-9 (1972) establishes a State Board of Engineering and Architectural Examiners. S. D. Compiled Laws Ann. § 36-18-25.2 (1972) provides: "The board shall cause to have prepared and shall, in compliance with chapter 1-26, adopt a code of ethics, a copy of which shall be delivered to every registrant and applicant for registration under this chapter, and which shall be published in the roster provided for herein. Such publication shall constitute due notice to all registrants. Such code of ethics when adopted shall apply to all certificate holders, including specialists in any particular branch of a profession registered hereunder. Each registrant shall sign and return to the secretary of the board a statement stating that he will abide by the code of ethics. Violation of the code of ethics may be a basis for action on a certificate of registration or for an injunction but shall not also be the basis for criminal prosecution unless otherwise declared unlawful."

The Code of Ethics adopted by the Board provides: "... 4. He will, in his endeavor to secure engagements, negotiate only on the basis of fixed charges and will

never enter into competitive bidding to secure engagements."

Tennessee

Tenn. Code Ann. § 62-202 (1955) establishes a State Board of Examiners for Architects and Engineers. Rules of Professional Conduct adopted by the Board provide: "The Architect or Engineer shall solicit or accept work only on the basis of his qualifications."

Tenn. Code Ann. § 12-432 (1973) provides: "*Bids for professional services awarded on basis of competence and integrity.* Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of this state for legal services, fiscal agents or financial advisors or advisory services, educational consultants, and similar services by professional persons or groups of high ethical standards, shall not be based upon competitive bids, but shall be awarded on the basis of recognized competence and integrity."

Texas

Tex. Rev. Civ. Stat. Ann. art. 3271a, § 3 (1968) establishes a State Board of Registration for Professional Engineers.

Tex. Rev. Civ. Stat. Ann. art. 3721a, § 8 (1968) provides: "The Board shall have the authority and power to make and enforce all rules and regulations necessary for the performance of its duties, to establish standards of conduct and ethics for engineers in keeping with the purposes and intent of this Act or to insure strict compliance with and enforcement of this Act. The violation by any engineer of any provision of this Act or any rule or regulation of the Board shall be a sufficient reason or ground to suspend or

revoke the certificate of registration of such engineer . . .”

The Code of Responsibility for Professional Engineers adopted and promulgated by the Board provides: “Canon V—The engineer should endeavor to build his practice and professional reputation solely on the merit of his services. . . . EC5.2 Competition in a learned profession, such as Engineering, should be based upon the excellence, quality and efficacy of professional performance only. Competitive bidding solely upon the basis of price has no place in the practice of learned professions. As the courts and Legislature of this State have recognized, competitive bidding for Professional Engineering services solely on the basis of price probably would be the best method that could be conceived for clients to obtain the services of the least competent practitioners, and would be disastrous to the welfare of the public. EC5.3 Competitive bidding to obtain work requiring Professional Engineering services is not in the public interest; is a form of solicitation; and is conduct contrary to that practiced in other learned professions in this State. . . . DR5.4 Competitive bidding for Professional Engineering services is not in the public interest, is a form of solicitation, and is conduct contrary to the practices in this State, and, as such, is a violation of the Texas Engineering Practice Act. (a) A competitive bid for Engineering services is defined as the publication or communication to a prospective client of a proposal or estimate of the fee or compensation to be received for Engineering services, which is published or communicated with the knowledge or reasonable expectation that similar proposals or estimates for said Engineering services are being solicited from any other Engineer, or Engineering firm, partnership or corporation engaged in the practice of

Engineering by authority of Section 17 of the Texas Engineering Practice Act; however, (b) The Engineer shall not be considered in violation of the Act in cases where his Engineering services are offered, furnished, or performed as an integral part of research and development programs, construction projects, manufactured products, processes, or devices, which are to be offered, performed, supplied or obtained on the basis of competitive bids.”

Tex. Rev. Civ. Stat. Ann. art. 664-4 (Supp. 1974) provides: “Section 1. This Act shall be known and may be cited as the ‘Professional Services Procurement Act.’ Section 2. For purposes of this Act the term ‘professional services’ shall mean those within the scope of the practice of accounting, architecture, optometry, medicine or professional engineering as defined by the laws of the State of Texas or those performed by any licensed architect, optometrist, physician, surgeon, certified public accountant or professional engineer in connection with his professional employment or practice. Section 3. No state agency, political subdivision, county, municipality, district, authority or publicly owned utility of the State of Texas shall make any contract for, or engage the professional services of, any licensed physician, optometrist, surgeon, architect, certified public accountant or registered engineer, or any group or association thereof, selected on the basis of competitive bids for such contract or for such services to be performed, but shall select and award such contracts and engage such services on the basis of demonstrated competence and qualifications for the type of professional services to be performed and at fair and reasonable prices, as long as professional fees are consistent with and not higher than the published recommended practices and fees of the various applicable professional associations

and do not exceed the maximum provided by any state law. Section 4. Any and all such contracts, agreements or arrangements for professional services negotiated, made or entered into, directly or indirectly, by any agency or department of the State of Texas, county, municipality, political subdivision, district, authority or publicly-owned utility in any way in violation of the provisions of this Act or any part thereof are hereby declared not to be given effect or enforced by any Court of this State or by any of its public officers or employees.

Virginia

Va. Code Ann. § 54-18 (1972) establishes a State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors.

Chapter 459 of the 1974 Virginia Session Laws, signed by the Governor April 7, 1974, amends Va. Code Ann. § 54-25 (1972) to provide: "The Board shall promulgate all necessary rules and regulations not inconsistent with this chapter, for its own organization, and as to the professional qualifications of applicants, the requirements necessary for passing examinations, in whole or in part, and as to all things necessary or expedient for the proper conduct of its examinations and the proper discharge of its duties.

Such rules and regulations may include a code of professional practice and conduct, the provisions of which shall serve any or all of the following purposes: . . . (4) The prohibition of solicitation or acceptance of work by professionals on any basis other than their qualifications for the work offered; . . ."

Washington

Wash. Rev. Code Ann. § 18.43-110 (1961) provides for revocation of an engineer's certificate if he is

found guilty of " . . . Any gross negligence, incompetency, or misconduct in the practice of engineering . . ." "Misconduct" is defined in Wash. Rev. Code Ann. § 18.43-105 (1961) to include: ". . . (9) Unfair competition—Reducing a fee quoted for prospective employment or retainer as an engineer after being informed of the fee quoted by another engineer for the same employment or retainer; . . . (11) Committing any other act, or failing to act, which act or failure are customarily regarded as being contrary to the accepted professional conduct or standard generally expected of those practicing professional engineering or land surveying."

West Virginia

W.Va. Code Ann. § 30-13-3 (1971) establishes a State Board of Registration for Professional Engineers.

Regulations issued by the Board provide: ". . . § 6.02 The Board may suspend or revoke the certificate of registration of any professional engineer registered hereunder who fails to conform to rules of professional conduct as set forth below . . . E.(2) He shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit or submit proposals for professional services on the basis of competitive bidding. Competitive bidding is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer or one engineering organization, has been selected for negotiations; provided, however, the

submission and discussion of data published by professional engineering societies is not considered to constitute competitive bidding."

Wyoming

Wyo. Stat. Ann. § 15.1-13 (Supp. 1973) provides: "Contracts for public improvements generally. All contracts for purchases of property or for any public improvement, contracts relating to the municipal water supply, contracts for the lighting of streets, public buildings and public places, and any other public work or improvement excepting contracts for engineering services required to complete such improvements for any city or town when the cost exceeds \$1,500 shall be advertised for bid."

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS CODE OF ETHICS FOR ENGINEERS

Preamble

The Engineer, to uphold and advance the honor and dignity of the engineering profession and in keeping with high standards of ethical conduct:

- *Will be honest and impartial, and will serve with devotion his employer, his clients, and the public;*
- *Will strive to increase the competence and prestige of the engineering profession;*
- *Will use his knowledge and skill for the advancement of human welfare.*

SECTION 1—The Engineer will be guided in all his professional relations by the highest standards of integrity, and will act in professional matters for each client or employer as a faithful agent or trustee.

a. He will be realistic and honest in all estimates, reports, statements, and testimony.

b. He will admit and accept his own errors when proven wrong and refrain from distorting or altering the facts in an attempt to justify his decision.

c. He will advise his client or employer when he believes a project will not be successful.

d. He will not accept outside employment to the detriment of his regular work or interest, or without the consent of his employer.

e. He will not attempt to attract an engineer from another employer by false or misleading pretenses.

f. He will not actively participate in strikes, picket lines, or other collective coercive action.

g. He will avoid any act tending to promote his own interest at the expense of the dignity and integrity of the profession.

SECTION 2—The Engineer will have proper regard for the safety, health, and welfare of the public in the performance of his professional duties. If his engineering judgment is overruled by non-technical authority, he will clearly point out the consequences. He will notify the proper authority of any observed conditions which endanger public safety and health.

a. He will regard his duty to the public welfare as paramount.

b. He shall seek opportunities to be of constructive service in civic affairs and work for the advancement of the safety, health and well-being of his community.

c. He will not complete, sign, or seal plans and/or specifications that are not of a design safe to the public health and welfare and in conformity with accepted engineering

standards. If the client or employer insists on such unprofessional conduct, he shall notify the proper authorities and withdraw from further service on the project.

SECTION 3—The Engineer will avoid all conduct or practice likely to discredit or unfavorably reflect upon the dignity or honor of the profession.

a. The Engineer shall not advertise his professional services but may utilize the following means of identification:

(1) Professional cards and listings in recognized and dignified publications, provided they are consistent in size and are in a section of the publication regularly devoted to such professional cards and listings. The information displayed must be restricted to firm name, address, telephone number, appropriate symbol, name of principal participants and the fields of practice in which the firm is qualified.

(2) Signs on equipment, offices and at the site of projects for which he renders services, limited to firm name, address, telephone number and type of services, as appropriate.

(3) Brochures, business cards, letterheads and other factual representations of experience, facilities, personnel and capacity to render service, providing the same are not misleading relative to the extent of participation in the projects cited, and provided the same are not indiscriminately distributed.

(4) Listings in the classified section of telephone directories, limited to name, address, telephone number and specialties in which the firm is qualified.

b. The Engineer may advertise for recruitment of personnel in appropriate publications or by special distribution. The information presented must be displayed in a dignified manner, restricted to firm name, address, telephone number, appropriate symbol, name of principal par-

ticipants, the fields of practice in which the firm is qualified and factual descriptions of positions available, qualifications required and benefits available.

c. The Engineer may prepare articles for the lay or technical press which are factual, dignified and free from ostentations or laudatory implications. Such articles shall not imply other than his direct participation in the work described unless credit is given to others for their share of the work.

d. The Engineer may extend permission for his name to be used in commercial advertisements, such as may be published by manufacturers, contractors, material suppliers, etc., only by means of a modest dignified notation acknowledging his participation and the scope thereof in the project or product described. Such permission shall not include public endorsement of proprietary products.

e. The Engineer will not allow himself to be listed for employment using exaggerated statements of his qualifications.

SECTION 4—The Engineer will endeavor to extend public knowledge and appreciation of engineering and its achievements and to protect the engineering profession from misrepresentation and misunderstanding.

a. He shall not issue statements, criticisms, or arguments on matters connected with public policy which are inspired or paid for by private interests, unless he indicates on whose behalf he is making the statement.

SECTION 5—The Engineer will express an opinion of an engineering subject only when founded on adequate knowledge and honest conviction.

a. The Engineer will insist on the use of facts in reference to an engineering project in a group discussion, public forum or publication of articles.

SECTION 6—The Engineer will undertake engineering assignments for which he will be responsible only when qualified by training or experience; and he will engage, or advise engaging, experts and specialists whenever the client's or employer's interests are best served by such service.

SECTION 7—The Engineer will not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent.

a. While in the employ of others, he will not enter promotional efforts or negotiations for work or make arrangements for other employment as a principal or to practice in connection with a specific project for which he has gained particular and specialized knowledge without the consent of all interested parties.

SECTION 8—The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client.

a. The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer.

b. When in public service as a member, advisor, or employee of a governmental body or department, an Engineer shall not participate in considerations or actions with respect to services provided by him or his organization in private engineering practice.

c. An Engineer shall not solicit or accept an engineering contract from a governmental body on which a principal or officer of his organization serves as a member.

SECTION 9—The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work.

a. He will not undertake or agree to perform any engineering service on a free basis, except for civic, charitable, religious, or eleemosynary nonprofit organizations when the professional services are advisory in nature.

b. He will not undertake work at a fee or salary below the accepted standards of the profession in the area.

c. He will not accept remuneration from either an employee or employment agency for giving employment.

d. When hiring other engineers, he shall offer a salary according to the engineer's qualifications and the recognized standards in the particular geographical area.

e. If, in sales employ, he will not offer, or give engineering consultation, or designs, or advice other than specifically applying to the equipment being sold.

SECTION 10—The Engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties.

a. He will not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.

b. He will not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with his clients or employer in connection with work for which he is responsible.

SECTION 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competi-

tive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods.

a. The Engineer will not attempt to supplant another engineer in a particular employment after becoming aware that definite steps have been taken toward the other's employment.

b. He will not pay, or offer to pay, either directly or indirectly, any commission, political contribution, or a gift, or other consideration in order to secure work, exclusive of securing salaried positions through employment agencies.

c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals.

d. An Engineer shall not request, propose, or accept a professional commission on a contingent basis under circumstances in which his professional judgment may be

compromised or when a contingency provision is used as a device for promoting or securing a professional commission.

e. While in a salaried position, he will accept part-time engineering work only at a salary or fee not less than that recognized as standard in the area.

f. An Engineer will not use equipment, supplies, laboratory, or office facilities of his employer to carry on outside private practice without consent.

SECTION 12—The Engineer will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice or employment of another engineer, nor will he indiscriminately criticize another engineer's work. If he believes that another engineer is guilty of unethical or illegal practice, he shall present such information to the proper authority for action.

a. An Engineer in private practice will not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.

b. An Engineer in governmental, industrial or educational employ is entitled to review and evaluate the work of other engineers when so required by his employment duties.

c. An Engineer in sales or industrial employ is entitled to make engineering comparisons of his products with products by other suppliers.

SECTION 13—The Engineer will not associate with or allow the use of his name by an enterprise of questionable character, nor will he become professionally associated with engineers who do not conform to ethical practices, or with persons not legally qualified to render the professional services for which the association is intended.

a. He will conform with registration laws in his practice of engineering.

b. He will not use association with a nonengineer, a corporation, or partnership, as a "cloak" for unethical acts but must accept personal responsibility for his professional acts.

SECTION 14—The Engineer will give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.

a. Whenever possible, he will name the person or persons who may be individually responsible for designs, inventions, writings, or other accomplishments.

b. When an Engineer uses designs supplied to him by a client, the designs remain the property of the client and should not be duplicated by the Engineer for others without express permission.

c. Before undertaking work for others in connection with which he may make improvements, plans, designs, inventions, or other records which may justify copyrights or patents, the Engineer should enter into a positive agreement regarding the ownership.

d. Designs, data, records, and notes made by an engineer and referring exclusively to his employer's work are his employer's property.

SECTION 15—The Engineer will cooperate in extending the effectiveness of the profession by interchanging information and experience with other engineers and students, and will endeavor to provide opportunity for the professional development and advancement of engineers under his supervision.

a. He will encourage his engineering employees' efforts to improve their education.

b. He will encourage engineering employees to attend and present papers at professional and technical society meetings.

c. He will urge his engineering employees to become registered at the earliest possible date.

d. He will assign a professional engineer duties of a nature to utilize his full training and experience, insofar as possible, and delegate lesser functions to subprofessionals or to technicians.

e. He will provide a prospective engineering employee with complete information on working conditions and his proposed status of employment, and after employment will keep him informed of any changes in them.

Note: In regard to the question of application of the Code to corporations vis-a-vis real persons, business form or type should not negate nor influence conformance of individuals to the Code. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The Code is clearly written to apply to the Engineer and it is incumbent on a member of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the Code.

(NSPE publication No. 1102 As Revised January 1974)

[Defendant's Exhibit 215]

**JUDICIAL DECISIONS REGARDING SOLICITATION OF
PROFESSIONAL WORK BY FEE BIDDING**

1. *City of Inglewood—L.A. City Civ. Ctr. Auth. v. Superior Ct.*, 103 Cal. Rptr. 689, 500 P.2d 601 (1972).
2. *Willis v. Santa Ana Community Hospital Assn.*, 26 Cal. Rptr. 640, 376 P.2d 568 (1962).
3. *Kennedy v. Ross*, 28 Cal. 2d 569, 170 P.2d 904 (1946).
4. *City and County of San Francisco v. Boyd*, 17 Cal.2d 606, 110 P.2d 1036 (1941).
5. *Cobb v. Pasadena City Board of Education*, 134 Cal. App.2d 93, 285 P.2d 41 (1955).
6. *Miller v. Boyle*, 43 Cal. App. 39, 184 P.421 (1919).
7. *McNichols v. City and County of Denver*, 274 P.2d 317 (Colo. 1954).
8. *City of Pensacola v. Kirby*, 47 So.2d 533 (Fla. 1950).
9. *Cress v. State*, 198 Ind. 323, 152 N.E. 822 (1926).
10. *City of Hazard v. Salyers*, 311 Ky. 667, 224 S.W.2d 420 (1949).
11. *Jeffersontown v. Cassin*, 267 Ky. 568, 102 S.W.2d 1001 (1937).
13. *Rollins v. City of Salem*, 251 Mass. 468, 146 N.E. 795 (1925).
14. *City of Grand Rapids v. Harper*, Dkt. No. 9229 (Circuit Court for Kent County, Michigan, 1969).
15. *Krohnberg v. Pass*, 187 Minn. 73, 244 N.W. 329 (1932).
16. *Hellman v. St. Louis County*, 302 S.W.2d 911 (Mo. 1957).

17. *Lane-Western Co. v. Buchanan County, Mo.*, 85 F.2d 343, 347 (8th Cir. 1936).
18. *Cosentino v. City of Omaha*, 186 Neb. 407, 183 N.W.2d 475 (1971).
19. *Franklin v. Horton*, 97 N.J.L. 25, 116 A. 176 (1922).
20. *Heston v. Atlantic City*, 93 N.J.L. 317, 107 A. 820 (1919).
21. *Neal v. Board of Education*, 40 N.M. 13, 52 P.2d 614, 615 (1935).
22. *Potts v. City of Utica*, 86 F.2d 616 (2d Cir. 1936).
23. *Lincoln Rochester Trust Co. v. Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974).
24. *People ex rel. Smith v. Flagg*, 17 N.Y. 584 (1858).
25. *City of New York v. Beame*, 37 App. Div.2d 89, 322 N.Y.S.2d 503 (1971).
26. *Hurd v. Erie County*, 34 App. Div.2d 289, 36 N.Y.S.2d 953 (1970).
27. *People ex rel. Kiehm v. Board of Education*, 198 App. Div. 476, 190 N.Y.S. 798 (1921).
28. *Vermeule v. City of Corning*, 186 App. Div. 206, 174 N.Y.S. 220 (1919), *aff'd per curiam*, 230 N.Y. 585, 130 N.E. 903 (1920).
29. *Bernstein v. City of New York*, 134 App. Div. 226, 118 N.Y.S. 903 (1909).
30. *Horgan & Slattery v. City of New York*, 144 App. Div. 555, 100 N.Y.S. 68 (1906).
31. *Rosatti v. Common School District*, 52 N.D. 931, 204 N.W. 833 (1925).
32. *Braaten v. Olson*, 28 N.D. 235, 148 N.W. 829 (1914).
33. *State ex rel. Doria v. Ferguson*, 145 Ohio St. 12, 60 N.E.2d 476 (1945).

34. *Cudell v. City of Cleveland*, 16 Ohio C.C.R. (n.s.) 374 (1905), *aff'd*, 74 Ohio St. 476, 78 N.E. 1123 (1905).
35. *Weathers v. Layton & Forsyth*, 104 Okla. 14, 230 P. 750 (1924).
36. *Stratton v. Allegheny County*, 245 Pa. 519, 91 A. 894 (1914).
37. *Idell v. County of Delaware*, 15 Del. Co. 450, 34 York Leg. Rec. 188 (Pa. 1920).
38. *Foss v. Spitznagel*, 77 S.D. 633, 97 N.W.2d 856 (1959).
39. *Codington County v. Board of Commerce of Codington County*, 51 S.D. 131, 212 N.W. 626 (1927).
40. *Modjeski and Masters v. Pack*, 215 Tenn. 629, 388 S.W. 2d 144 (1965).
41. *Stephens County v. J. N. McCammon, Inc.*, 122 Tex. 148, 52 S.W.2d 53 (1932).
42. *Gulf Bitulithic Co. v. Nueces County*, 11 S.W.2d 305 (Tex. 1928).
43. *Tackett v. Middleton*, 280 S.W. 563 (Tex. 1926).
44. *Hunter v. Whiteaker & Washington*, 230 S.W. 1096 (Tex. Civ. App. 1921).
45. *City of Houston v. Glover*, 40 Tex. Civ. App. 177, 89 S.W. 425 (1905).
46. *City of Newport News v. Potter*, 122 F. 321, 331 (4th Cir. 1903).
47. *Flottum v. City of Cumberland*, 234 Wis. 654, 291 N.W. 777 (1940).
48. *Water District No. 1 v. Carl Heck Engineers, Inc.*, — So. 2d — (La. App., May 9, 1977).
49. *State v. McIlhenny*, 201 La. 78, 9 So. 2d 467 (1942).